United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2617

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE LUPARAR, JOHN SHUTTLE, Editor of Luparar, CRAIG MURRAY, Individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

R. "EFF" STOKEMAN, Individually and as Commissioner of the Department of Corrections of the State of Vermont, MICHAEL MOEYKENS, Individually and as Acting Warden of the Vermont State Prison at Windsor, Vermont,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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REPLY BRIEF

INTRODUCTION

The purpose of this reply brief is to speak to several points raised by the Plaintiffs in their Brief. Defendants' main presentation is in its brief dated February 26, 1975, and undue repretition will be avoided.

THERE IS CLEARLY A FACTUAL DISPUTE PRESENTED BY THE FACTS

Plaintiffs contend that;

> "The record in this case fails to disclose any factual dispute between the parties with regard to any material issue in the case. Even if a factual dispute can be said to exist, the record is devoid of specific facts showing that a genuine issue exists as required by Rule 56(e)." (Plaintiffs brief P. 8-9)

Does Plaintiff mean that there are no facts showing that following distribution of the paper that there was a riot or disturbance and thus no security problem? There was no disturbance or riot but as the Commissioner noted; ".... but this is Monday morning quarterbacking." (Appendix p. 121) The Commissioner who is charged by statute to maintain discipline, control, security, safety and order at the correctional facilities reasonably determined that the above mentioned articles created a threat to security because the articles attacked individuals who worked inside the institution which could have an effect of leading to confrontation between the staff and inmates. He re-emphasized his fears in an affidavit relative to a state subsidized newspaper.

> "Based on my experience as a correctional administrator, it is my opinion that such personal attacks on staff through a vehicle which is state subsidized are highly capable and undoubtedly would, if permitted to continue over a period of time, provoke acts of retaliation by guards against inmates and vice-versa." (Appendix at p. 362)

The issue arises not from viewing the results after distribution. Nor is the existence of an issue for trial properly decided by the court reading the articles in question and finding that they fail to show a threat to security, order or rehabilitation.

The Commissioner has clearly indicated a threat to security is involved in either in or out of prison distribution of a state subsidized inmate newspaper and this presents the issue for trial. Thus summary judgment was not appropriate.

Plaintiffs seem to acknowledge the existence of a material issue of fact in their brief and accept the "Statement of the Case" as set forth in Defendants' brief with the single qualification that it should be supplemented with the testimony of Acting Warden Moeykens. (Plaintiffs' brief at p. 4)

In the portion of Defendants' "Statement of the Case" that Plaintiffs accept it is established that;

1. A set of policies and guidelines were established for the printing of The Luparar as a result of an idea for such a paper that arose from a list of demands following a riot at the prison. The Commissioner felt that it was a good idea to have such a newspaper and would encourage and help to fund and print it if there were guidelines that "everybody would agree on". After negotiations between prison personnel and inmates, guidelines for publishing were agreed upon and this was prior to the commencement of publication. The guidelines, one of which was "editorials were to attack issues and not personalities" are found on p. 2-3 of Defendants' brief.

2. The basic elements of the guidelines were accepted by the inmates up until October 1972 when a new editor took charge of the paper. The former editor had reaffirmed his belief in the guidelines in July 1972 by indicating that the paper would "present opinions on issues, not personalities."

3. Beginning in the October 1972 issue there was a noticed shift in the direction of the paper as it was attacking personalities and publishing potentially libelous and highly inflammatory articles.[1]

4. The Commissioner of Corrections felt that these particular articles related to the security of the institution in the sense that they attacked the individuals who worked inside an institution which could have an effect of leading to confrontation between the staff and inmates.

5. These attacks include among others an indication that the Warden was a "psychopath", the Parole Board were "political mongrels of the old reich" and that the inmates needed to "choke information out of the Director of Education" and these articles prompted the Commissioner's decision to prevent distribution of the January issue.

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[1]Plaintiff does note by way of footnote that "It should be clear that the characterization of the article as 'potentially libelous and highly inflammatory' were Commissioner Stoneman's."

6. There were two meetings with the inmates about the objectionable articles and their position was that they would not have a paper that was subject to any censorship. Since then the inmates have refused to negotiate for any new guidelines, even though the Department has offered a new set.

7. On Motion Alternatively For A New Trial, Rehearing or Reargument of Motion for Summary Judgment, an affidavit of Commissioner Stoneman was offered re-emphasizing his fears relative to a threat to security, order and rehabilitation at the prison presented by the January 1973 edition of The Luparar. Subsequent to this the court amended its Opinion and Order in part.

In addition Plaintiffs state that;

> "Outside distribution could not possibly have affected the internal operation of the prison except insofar as the knowledge of prison officials and personnel that they were being publicly criticized might have an effect on morale."

Plaintiffs as well refer in several places to where staff showed discontent with the criticism by citing portions of Warden Moeykens deposition. "Some of the employees were unhappy" (p. 14 Plaintiffs brief), "members of the staff who complained" and that they needed consoling (p. 5 Plaintiffs memo). The discontent and polarization that would occur between inmates and the problems that could result from confrontation that could occur as a result were the concern of the Commissioner and he

clearly expressed that. From a penalogist's standpoint this was enough to create the danger under certain circumstances, circumstances that the court below did not look at in reaching its decision.

It is appropriate to mention in this context that the court had problems with the "tone and content" of the articles. To inmates and prison staff these problems are of greater importance and could well cause a security problem. First Amendment guarantees must be "applied in light of the special characteristics of the.... environment." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969). The court below had arguably nothing before it nor was there any discussion relative to the atmosphere at the prison. This is a must before it can be said that the facts fail to disclose an issue as to a material fact.

Plaintiff lays great emphasis upon a letter written by an attorney for the Department of Corrections. (Appendix p. 220-222) On Page 15 of Plaintiffs' brief this letter is directly attributed to the Commissioner. At a deposition a question was posed to the Commissioner which itself appears to acknowledge the presence of a material issue relative to security. Plaintiff asked relative to the letter, " ... but doesn't paragraph six of the letter contradict your testimony today?"[2] The Commissioner's

[2] "6. The confiscated edition of The Luparar probably does not constitute a "security" problem, under the very rigid tests the courts have laid down. The issue in question would be admitted into the facility, if it were published verbatim externally.

reply was, "I don't think it does." Plaintiff apparently followed that old rule of never asking a question you don't know the answer to and didn't give the Commissioner a chance to explain further. (Appendix p. 101) That letter only refers to a publication published externally and does not speak to the issue involved when the state is subsidizing such a publication and it is being sent out for public consumption. Clearly there is an issue of whether there was a contradiction. The Commissioner felt there wasn't.

A STATE SUBSIDIZED PRISON NEWSPAPER SUCH AS THE JANUARY 1975 EDITION OF THE LUPARAR DOES CREATE A RISK TO SECURITY, ORDER AND REHABILITATION

Plaintiff argues on p. 10-11 of his brief that the reliance on the Commissioner's testimony to show that a material issue of fact exists as to danger to the governmental interests of securit, order and rehabilitation is misplaced by stating that it "misses the mark because the primary question addressed by the court was whether a legitimate governmental interest existed for preventing distribution outside the prison. Luparar v. Stoneman, 382 F. Supp., supra at 498-499)."

The court did in fact deal with in-prison as well as out-of-prison distribution. Even taking Plaintiffs assertion that out-of-prison distribution was the primary question facing the court it becomes evident that Plaintiffs' understanding rather

than Defendants' argument is what "misses the mark". The Commissioner was concerned about a State subsidized newspaper that is used to attack personnel. The element of state subsidy is important when realistically viewing the matter. That out-of-prison distribution attacks may occur in a mass mailing context is bad enough but when the state is forging the sword that is used to inflict the wound then it has gone too far. As the Commissioner indicated in his affidavit;

> "Tension between staff and inmates with the threat of retaliation is always a problem, however, this threat is greatly magnified when these attacks become public and it is learned that the state is subsidizing them. In my opinion, these personal attacks create unacceptable levels of danger to all concerned." (Appendix pp. 362-63.)

It is not public reaction that is of great concern but inmate and staff reaction.

The problem of possible confrontation between guards and inmates is a very real and recognized problem. The United States Supreme Court in Wolff v. McDonnell, _____U.S._____, 15 Cr.L. 3304, 3313 noted in refusing to mandate confrontation and cross examination of witnesses at disciplinary hearings that;

> "Prison officials must have the necessary discretion to keep the hearing within reasonable limits and refuse to call witnesses that may create a risk of reprisal or undermine authority ...."

The court noted that;

"If confrontation and cross-examination of those furnishing evidence were to be allowed as a matter of course as in criminal trials, there would be considerable potential for havoc inside the prison walls." (emphasis added)

The court continued by stating;

"Perhaps as the problems of penal institutions change and correctional goals are reshaped, the balance of interests involved will require otherwise. But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many states .... to avoid situations that may trigger deep emotions ..."

And finally the court through recognizing a more serious problem involving the cross-examination of an unknown inmate informer said;

"Although the dangers posed by cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial." (emphasis added)

The case now before this court is directly analogous to the confrontation and cross-examination question faced by the court in Wolff. The Supreme Court determined that security consideration must prevail. The pressures and dangers are certainly more serious when a guard or official is ridiculed in a publication available to all prisoners and staff as well as the general public, especially when the state is supplying the means to launch the attacks. It follows from the Wolff analysis that the publication was properly curtailed under the facts as presented. As many times mentioned there are alternative means of communication

of critical or even malicious opinions about officials. There is no doubt that this type of information can be communicated by mail. That is the teaching of Procunier v. Martinez, 42 U.S.L.W. 4606, (U.S. April 29, 1974). That is the extent of its teaching.

The analysis used by the court in Pell v. Procunier, 15 Cr.L. 3202 should be noted. The court curtailed First Amendment rights at least partially due to a threat to order and security. That threat was correctional officials' speculative fear that inmates would use personal interviews with members of the press to obtain status among their peers. In turn, these inmates might encourage others to violate institutional rules. Authorities could only speculate that such interviews might have something to do with previous violent uprisings. Thus, there is ample authority for curtailing First Amendment rights on the basis of somewhat speculative fears. The fears expressed by the Warden and the Commissioner are at least as substantial.

Without arguing further the standard to be applied in reviewing Rule 56(e), suffice it to say that using the standard favored by Plaintiffs as expressed in American Manufacturers Mutual Ins. Co. v. American Broadcasting - Paramount Theatres, Inc., 388 F2d 272 (2d Cir. 1967); ("informed and proper reasoned judgment as a guide to determine when a material issue or fact exists"), such a dispute must be found to exist in light of the

state of the record. It is true that Rule 56(e) requires that specific facts be set forth showing there is a genuine issue for trial. It is also true that the party moving for summary judgment has the burden of showing the absence of a material factual issue for trial. Adickas v. S. H. Kress and Company, 398 U.S. 144 (1970).

Plaintiff has failed to carry that burden. The best that he can do is say that the Commissioner's opinions express mere apprehension which is not sufficient in light of the court's examination of the articles and its findings that there was no genuine issues for trial. Is it necessary that there be disruption or retaliation? Plaintiff seems to rely heavily on the fact that there were no immediate repercussions that were attributable to the newspaper. Must there be a killing or riot before it can be said the Commissioner's opinion was a valid one or is there room for error and speculation in his decision making?

IT WAS ERROR FOR THE COURT TO SUMMARILY TRY THE ISSUE RAISED BY APPLYING PROCUNIER STANDARDS TO THIS CASE

At P. 13-14 Plaintiffs make an argument concerning Defendants allegation that the court below erred in summarily trying the facts in granting summary judgment. This is in reference to the court reviewing the articles and finding they did not

create a Procunier type threat.

> "But they (Defendants) acknowledge that on a motion for summary judgment, this court can sift the facts to determine whether there is an issue to be tried (Defendants brief p. 13). This is precisely what Judge Coffrin did in this case."

The court's job was not to try the ultimate question of whether the articles created a threat to security, order and rehabilitation, but was to see if there was a dispute as to the facts related to the ultimate question in dispute. The court below tried the issue of fact thus it must have felt that there was an issue to be tried. Thus the court erred and in no way can as Plaintiff claims this action be considered a proper application of summary judgment procedure.

What the court should sift is not the articles but the facts relative to the issue of whether a dispute as to the facts exist between the parties.

THE GUIDELINES FOR PUBLICATION OF THE LUPARAR DO NOT IMPOSE UNCONSTITUTIONAL CONDITIONS ON PUBLICATION

Plaintiffs claim that although Defendants were under no obligation to permit the inmates to publish a newspaper, having given their permission they could not impose unconstitutional conditions on its publication. It is clear that the State has not burdened the granting of a privilege by requiring the relinquishing of a basic constitutional right. Plaintiffs are

not precluded from expressing their attacks on personalities though other means including visits, phone, letters, external publication and other means. Such attacks, however, have been prohibited from appearing in a state-subsidized prisoner newspaper and prohibited as a result of negotiations on the matter between prison personnel and inmates. The guidelines for publishing were later reaffirmed by the inmate editor of The Luparar. Such a condition is reasonable in light of the expressed concerns of the Commissioner of Corrections.

It is not as if the Department had set guidelines such as if you want to publish a newspaper with State support you cannot at any time or in any context criticize the administration. Such a condition would have a hard time surviving a constitutional challenge, but not so with the guidelines in this case.

Dated at Montpelier, Vermont, this 3rd day of June, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of June, 1975, I served a copy of the above Reply Brief on the Plaintiffs in this matter, by mailing ~~a~~ 2 true conformed copy thereof in a sealed envelope, first-class, postage prepaid to Richard S. Kohn, Esq., Vermont-New Hampshire Staff Counsel, American Civil Liberties Union of Vermont, Inc., 43 State Street, Montpelier, Vermont 05602.

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